Nos. 09-1454, 09-1478

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondents.

JAMES ALFORD, Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE SOCIETY OF CATHOLIC SOCIAL SCIENTISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Society of Catholic Social Scientists ("SCSS") respectfully submits this *amicus curiae* brief in support of the Respondents, Sarah Greene, et al. We believe that the questions presented in this case have serious implications for American law and public policy relating to the rights of parents, the integrity of the family, and the powers of government. They concern the dignity and rights of the human person and the family, which are central to Catholic social and moral teaching.

The SCSS is an interdisciplinary association of Catholic social scientists, devoted to upholding the teachings of the Church. Its purposes are to pursue and produce objective knowledge about the social order, evaluate contemporary social science work in light of Catholic social teaching, consider how this teaching might be applied to the problems of modern society, encourage distinctively Catholic scholarship in the social sciences, and (where appropriate) to put the tools of social science at the service of the Church's evangelizing mission. These purposes reflect Pope Pius XI's call eighty years ago for "the building up of a true Catholic social science." Pope Pius XI, *Reconstructing the Social Order* (1931). The SCSS carries out its programs by such means as conferences, a week-long summer institute, an

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Letters of consent are on file at the Court.

annual scholarly journal (*The Catholic Social Science Review*), a book series and other publications, and an M.Th. program in Catholic Social Thought through the Graduate Theological Foundation.

SUMMARY OF THE ARGUMENT

The fundamental rights of parents to direct and control the upbringing of their children and the integrity and liberty of the family have been recognized time and again by this Court. These rights and this liberty are not mere creatures of the state or positive law, but are grounded in the natural order of things. The family has the end or purpose of developing good human persons and good citizens. Parents' rights are necessary for them to pursue this high calling and duty. As such, the state may not interfere with parental decision-making except in grave cases when it is truly necessary to prevent genuine harm.

The child protective system ("CPS"), from its inception almost forty years ago, has intervened with abandon into families across the country, often even removing children from the custody and control of their parents without justification. It has done so on the basis of vague and overbroad statutes on, and confused official notions about, child abuse and neglect. Some CPS practices, as in the present case, have been harmful to the very children it claims to be protecting. Due to legal immunity, its operatives have been largely unaccountable for their routine violations of parental rights, unwarranted intervention into the family, and readiness to accuse

the innocent. There is a crucial need for this Court to establish a standard that permits the abridgement of parental rights and CPS intervention into the family only when there is a compelling state interest.

ARGUMENT

I.

Due to the Fundamental Character of Parental Rights, State Intervention Into the Family and Interference with Parental Decision-making Should Be Permitted Only When Absolutely Necessary, Pursuant to a Compelling State Interest, and then Should Be Carried Out in a Reasonable Manner.

To begin, it is worth quoting what the SCSS stated in its *amicus curiae* brief in support of the Respondent in *Troxel v. Granville,* 530 U.S. 57: "This Court has held and re-affirmed that the rights of parents to direct and control the upbringing of their children without unjustified intrusion or oversight by the State are fundamental and sit at the heart of the 'liberty' protected by the Fourteenth Amendment's due process clause." Brief, at 4. This Court has spoken about the liberty of parents and guardians to direct the upbringing and education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). It has called it "cardinal...that the custody, care and nurture of the child reside first in the parents whose primary function and freedom...the state can neither supply nor hinder."

Stanley v. Illinois, 405 U.S. 645, 651 (1972). In *Troxel*, this Court stated that, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children" and that it "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, at 66, 65. This Court has also included parental rights among the "basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and has indicated that they are "intrinsic human rights." *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977). This suggests awareness by this Court that parental rights, as important as they have been in American constitutional law, are not grounded exclusively or fundamentally in that but in the natural order of things—the natural law, to be sure—as this brief goes on to explain.

To be sure, this Court has never held that parental rights are absolute, that there can never be occasions when they may be abridged by the state. *See*, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). Indeed, there are circumstances when these rights may even be outright terminated, even though the state must meet a significant evidentiary burden to do so. *See Santosky v. Kramer*, 455 U.S. 743 (1982). In spite of such statements as the above in its opinions, some members of this Court have been reluctant to accord parental rights the same level of constitutional recognition and protection as rights specifically enumerated in the Bill of Rights because of an apparent concern about judicial arbitrariness.

See, e.g., *Troxel*, at 91-93 (J. Scalia dissent). These concerns are well taken, but not justified. If unenumerated rights are solidly grounded in the common law tradition—and thereby clearly identifiable—these dangers are much attenuated. Such is the case with parental rights. *See* John W. Whitehead, *Parents' Rights* 85-86 (1985). Even if one sees parental rights as ultimately grounded in natural law, as discussed below, this should not be the basis of concern that giving them strong legal protection would open the door to arbitrariness. While the debate about a natural law-based jurisprudence is an old one in this Court (*see*, e.g., *Calder v. Bull*, 3 Dall. 386 [1798], *Adamson v. California*, 332 U.S. 46 [1947]), judges relying on a sound notion of natural law are much less likely to slip into arbitrariness than those of a more positivistic bent. This is because of their understanding that judicial decisions must be grounded in sound, perennial principles transcending their mere will. *See* David F. Forte, "Natural Law and the Limits to Judicial Review," 1 *Catholic Soc. Sci. Rev.* 42-47 (1996).

Moreover, even though this Court has repeatedly recognized parental rights as fundamental, it has been hesitant to say in specific terms—at least in the absence of a corresponding claim of free exercise of religion (*see Wisconsin v. Yoder*, *supra*)—that a compelling state interest is required for their infringement. We believe that the fundamental nature of these rights and the crucial importance of the family to a sound political order, as discussed *infra*, require that this finally be done.

A. The Philosophical Foundations of Parental Rights.

As one philosopher puts it, while mutual love and mutual aid are sought in the marital state the human species also has the inclination to reproduce itself. Once conjugal rights are assumed the parents take on "an obligation which their natures and the nature of the domestic society [the family] have imposed on them: to accept full responsibility for continuing the process of producing a new man." Nature has provided the wherewithal for parents to carry out the arduous tasks associated with childrearing. "The mutual love of the parents, the aid they can give to each other...are a proper climate for the nestling," so childrearing is done "best in family life where there exist two people who love the offspring more than anyone else can." Raphael T. Waters, "The Basis for the Traditional Rights and Responsibilities of Parents," in Stephen M. Krason & Robert J. D'Agostino, eds., *Parental Rights: The Contemporary Assault on Traditional Liberties*, 21, 23, 26 (1988). To carry out the duties involved in the rearing and education of offspring requires rights. Nature would be providing very insufficiently for man if upon imposing duties or obligations on him it did not give him corresponding prerogatives—i.e., rights—to enable him to carry out those duties. By their very nature rights and duties are linked, and must be respected by other persons and the community. *See* Thomas J. Higgins, *Man As Man: The Science and Art of Ethics* (rev. ed.), 226-227 (1992); Pope John XXIII, *Peace on Earth* #28-30

(1963). Thus, sound philosophy recognizes the natural rights of parents. Waters, 25-26.

There is yet another ethical consideration. As is indicated *supra*, parents in the nature of things are better able to carry out tasks and decision-making within the family than are outside and distant entities such as the state. The principle of subsidiarity in social ethics is pertinent: "[I]t is an injustice and at the same time a grave evil and a disturbance of right order, to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies." Pope Pius XI, *supra* #79; *see also* E.F. Schumacher, *Small Is Beautiful: Economics as if People Mattered* 244 (1973). This principle stands behind the familiar American notion of federalism, but "applies to family-state relations as well as to relations between different levels of government." SCSS A.C. Brief in *Troxel* 9.

Even apart from the matter of the natural rights of parents, the state should respect family integrity for its own benefit. Aristotle stressed the character-building role of the family. As such, it is the spawning ground of good social and political relations; it helps form good citizens. *See* Aristotle, *Politics* II, iii; II, iv.

Despite the stress on parental rights and family integrity in our ethical and legal background, including the decisions of this Court, it is clear that the state is intruding on these in a wholesale way today. This was strikingly seen in the results of an extensive study undertaken by the Institute for American Values, which showed that most American

parents nowadays *take for granted* that the state has absolute power to monitor their families, shape their child-rearing practices, and even remove their children from them. *See* Dana Mack, *The Assault on Parenthood*, 62 (1997). This is especially illustrated by the facts about the child protective system (CPS) *infra*, which was involved in the present case and is a major source of such interference with the family.

B. Catholic Church Teaching on Parental and Family Rights.

While the philosophical and ethical discussion *supra* makes clear that parental rights do not have their basis just in specific religious traditions, they are strongly upheld by Catholic teaching. The Church teaches that the family "is the *original cell of social life*" *Catechism of the Catholic Church* #2207 (1994) (emphasis in original). It is "the first school of the social virtues that are the animating principle of the existence and development of society itself." Pope John Paul II, *Apostolic Exhortation on the Family*, III, iii (1982). It is incumbent upon the state to "respect and foster the dignity, lawful independence, privacy, integrity, and stability of every family." Holy See, Charter of the Rights of the Family, art. 6 (1983). Attempts by the state or even private organizations "in any way to limit the freedom of couples in deciding about their children constitute a grave offense against human dignity and justice." Id., art. 3. Still, the Church agrees with this Court's precedents that parental rights and family independence are not absolute. Pope Leo XIII, who

set out the modern social teaching of the Church, specified the criteria for what today would be called state intervention into the family: The state may not "at its option intrude into and exercise intimate control over the family." It may do so only when it is in "exceeding distress, utterly deprived of the counsel of friends, and without any prospect of extricating itself," or "if within the precincts of the household there occur grave disturbances of mutual rights." Pope Leo XIII, *Rerum Novarum* #14 (1891). As the discussion *infra* makes clear, the CPS routinely and sweepingly oversteps such bounds.

While it is indisputable that the possibility of sexual abuse, as in the present case, would involve such a "grave disturbance of rights" justifying state intervention, it does not follow that the state may simply disregard parental rights and conduct an investigation of the family in an unreasonable manner. Specifically, the state did not have the right to conduct a intensive, pressuring, and suggestive interrogation of the child (S.G.) in a threatening and extended manner, without the consent of her mother, the Respondent Sarah Greene– who was in no way suspected of any illegal or improper actions-- or the sanction of a court order. It did not have the right to prod and "grind down" the child until she gave them an answer that its operative wanted, which S.G. says is what happened. *See Greene v. Camreta, Alford, et al.*,. No. 06-35333 (9th Cir.), at 16303. By the way, this Court should not think that such CPS practices were unique to this case or to sexual abuse allegations. There is abundant evidence that they are not uncommon for the CPS

around the country. *See* Brenda Scott, *Out of Control*, chap. 8 (1994); Stephen M. Krason, "A Grave Threat to the Family: American Law and Public Policy on Child Abuse and Neglect," in Krason, *The Public Order and the Sacred Order* 178 (2009). If this Court overturns the 9th Circuit and closes off the opportunity to hold the CPS accountable for its actions under federal civil rights laws—as it is, the CPS and its operatives generally are immune from tort lawsuits and typically use confidentiality requirements designed to protect families to avoid transparency (*see* id., 170-172)—it may have the effect of stimulating more such troublesome investigatory practices. Most of the latter take place pursuant to the massive number of unfounded reports of alleged abuse and neglect involving mostly innocent parents each year (*see infra*). The CPS may interpret such a decision as a kind of imprimatur from this Court for its conduct.

II.

The Decades-Long Experience with the CPS Shows its Basic Arbitrariness and Systemic Violation of Parental Rights.

The numbers of false reports of child abuse and neglect each year are staggering. Douglas Besharov of the University of Maryland, perhaps the leading scholarly authority on the CPS, writes that consistently over the years approximately two-thirds of child abuse and neglect reports nationwide are

unsubstantiated or unfounded. Besharov, "Child Abuse Realities: Over-Reporting and Poverty," 8 *Va. J. of Soc. Policy and the Law* 165, 179-180 (2000). Other critical assessments of the CPS agree with this figure. *See* Stephen M. Krason, "The Critics of the Current Child Abuse Laws and the Child Protective System: A Survey of the Leading Literature," 12 *Catholic Soc. Sci. Rev.* 307, 340 (2007). In 1997—not an atypical year—that amounted to almost 1.98 million false reports involving over 2 million children. Besharov, "Child Abuse Realities," at 176, 179-180. Besharov points out, "the rate of substantiated reports has definitely declined, even while the total number of reports keeps increasing." Id., 179. Even most of the "substantiated" reports involve minor matters. Scott, 29-33. Moreover, the lack of certainty and clarity about what constitutes child abuse and neglect in state statutes—spawned by the federal Child Abuse Prevention and Treatment Act (CAPTA - the "Mondale Act") of 1974—suggests that the estimates of the number of unfounded reports may actually be understated. *See* Krason, "A Grave Threat," 245-250. While not pertinent to the facts of the present case, it is troublesome that courts have been reluctant to apply the vagueness and overbreadth analysis used in other areas of the law to the child abuse/neglect statutes (*see* id., 166) when it is apparent that perfectly normal and legal parental behaviors are what trigger most CPS investigations. The context of the present case, however, would permit this Court to firmly and clearly mandate the need for a compelling state interest before parental rights may

be abridged. If such a constitutional requirement were in place, the regimen of easy, unjustified CPS intervention into families would likely be attenuated.

Other factors besides the vagueness of the statutes are responsible for this problem. One is the legal immunity of CPS operatives (noted *supra*) and also of "mandatory reporters" (e.g., physicians, nurses, psychologists, counselors), who must report even "suspected" abuse and neglect (without, again, clearly defining it). Krason, "A Grave Threat" 171. Another is that the CPS operatives and mandatory reporters *are unable to agree among themselves* about what constitutes abuse and neglect. *See* id. 168-169; Richard Wexler, *Wounded Innocents* 86-87 (1990). Yet another reason is the long-term problem of insufficient qualifications of many CPS operatives. *See* Scott 57-59; Wexler 320; Mack 73.

The *unreliability and untrustworthiness* of the CPS is further suggested by other facts about how it operates. It has long exhibited the troubling perspective that parents cannot be trusted. *See* Krason, "A Grave Threat" 169. A survey of critical scholarly, legal, and journalistic writings about the CPS showed that most accused it of an anti-parent bias. Krason, "The Critics of the Current Child Abuse Laws," at 340. This is seen, by the way, in the present case in the interrogation of S.G. without her mother's, Respondent Sarah Greene's, consent and the barring of the latter from being present at the medical examination of S.G. *See Greene*, at 16306-16307. Next, contrary to a basic tenet of the Anglo-American legal tradition, once parents face a report

of abuse or neglect they are essentially presumed guilty, and bear the *de facto* burden of having to establish their fitness to parent their children to the satisfaction of the CPS. *See* Krason, "A Grave Threat," 160; Scott 131-134, 137. Even when cases get as far as juvenile court, parents are at a serious disadvantage when facing the CPS. Paul Chill, "Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings," 41 *Family Court Review* 457, at 460-461 (2003). Further, the CPS operates by a series of what one source calls "doctrines," which lack reasonableness, are sometimes contradictory, and often are not backed up by facts. One is that parents are to be blamed for everything concerning their children, and so the CPS is ready and even eager to find fault with them. More, it sees all parents as potential abusers. Another of its doctrines is that when a child states that a parent has been abusive—even if this comes after suggestive questioning—he is always telling the truth. By the same token, it holds that if a child later recants his allegation against a parent—as happened in the present case—the recantation is not reliable. Another doctrine, apparent in the present case, is that sexually abused children almost automatically cover up the abuse. Further, the CPS harbors the extravagant belief—ostensibly built from the beginning into CAPTA and its state statutory progeny—that it is somehow possible to identify any parent who is likely to abuse his or her child in the future, even if there has been no actual allegation of abuse. Mary Pride, *The Child Abuse Industry* 41-50 (1986). Besharov says that

such a claim is simply "unrealistic." Besharov, "'Doing Something' about Child Abuse: The Need to Narrow the Grounds for State Intervention," 8 *Harvard J. of Law and Pub. Policy* 539, 574-575 (1985).

Beyond its unreasonable doctrines, the CPS shows its untrustworthiness and unreliability in other ways: 1) It almost routinely assumes the veracity of almost any abuse/neglect report it receives, even those coming from anonymous hotlines. Scott 134; Krason, "A Grave Threat" 171. For the most part, no probable cause-type standard is required to launch an investigation of a parent. Stephen M. Krason, "Child Abuse and Neglect: Failed Policy and Assault on Innocent Parents," 10 *Catholic Soc. Sci. Rev.* 215, 222 (2005). 2) Prior to lower court decisions of the past several years, the CPS believed itself not subject at all to the Fourth Amendment as far as concerns its operatives entering and searching the private homes of families (see Krason, "A Grave Threat" 173-174). A different type of Fourth Amendment question, of course, is raised in the present case. 3) For a long time, the CPS embraced the highly questionable and now discredited "recovered memory" therapy, which claimed that therapists could tap suppressed memories in children of abuse even years in the past. Scott 147-148. 4) It frequently mistakes medical conditions of children for abuse. See Krason, "A Grave Threat" 162. 5) The lack of a reasonable definition of "abuse" and "neglect," epidemic of over-reporting, and the CPS's preoccupation with false allegations and insignificant matters frequently

diverts it from dealing with situations where children are genuinely endangered. In fact, a substantial percentage of children who die from maltreatment have had previous contact with the CPS. Besharov, "Child Abuse Realities," at 192. All this points to a system that is ineffective, counter-productive, and unaccountable, while at the same time violative of parental rights and family integrity. Moreover, it is also typically unwilling to acknowledge its failings or mistakes. *See*, e.g., Scott 38. It is often not even willing to permit the return of children once their parents have been exonerated. *See* Krason, "A Grave Threat," 160; Chill, at 460.

All of this makes it imperative that this Court decide that: 1) the CPS is not immune from federal civil rights liability, and 2) the CPS should be restrained from violating parental rights and intervening into the family unless it is able to show a compelling state interest.

III.

The Nature of the Interrogation of S.G. Violated Her Dignity as a Person, and thereby Her Fundamental Human Rights, and Also Went Against Constitutional Precedent.

The Catholic Church stresses the utter essentiality of upholding human dignity. "A just society can become a reality only when it is based on the transcendent dignity of the human person." *Compendium of the Social Doctrine of the Church*

#132 (2004). The Church holds, "the roots of human rights are to be found in the dignity that belongs to each human being." Id. #153. The Preamble of the UN Universal Declaration of Human Rights expresses this same belief of human rights as grounded in human dignity. *See* Univ. Decl. of H. Rts. Among the offenses that the Church teaches is against human dignity is torture, "which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred." *Catechism of the Catholic Church* #2297. Torture, of course, is condemned by the Universal Declaration (sec. 5) and is rejected by international law generally. *See* Winston P. Nagan & Lucie Atkins, "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement," 14 *Harvard Hum. Rts. Jour.* 87, 95-102 (2001). Torture is defined as the infliction of physical or psychological pain and suffering "by a victimizer who dominates and controls." Id. 93. In the realm of criminal law, some writers have alleged that the use of, in effect, psychological torture by prosecutorial authorities to pressure defendants into plea bargains has become commonplace. *See* Paul Craig Robert & Lawrence M. Stratton, *The Tyranny of Good Intentions*, chap. 9 (2000); John H. Langbein, "Torture and Plea Bargaining," 46 *Univ. of Chicago L. Rev.* 4 (1978). We do not suggest that international law or standards have to be the basis for this argument. This Court has long made it clear that under the Constitution official conduct of the nature of torture violates due process and is not acceptable as a means of extracting evidence. *See*

Rochin v. California, 342 U.S. 165 (1952). While this has involved persons charged with crimes, how much more this standard must be held to apply to interrogations of innocent persons—indeed, supposed victims—and even more to children. Moreover, psychological torture is no less torture because it does not involve the direct infliction of physical pain. Often, as in the present case—where S.G. went home after the duress of the extended interrogation and vomited five times (*see* Affidavit of S.G. in District Court Case)—psychological torture has physical manifestations. Again, such CPS interrogation practices are not unique to this case.

While this episode vividly illustrates damage done to a child by CPS practices, the harm it does to children in so many other ways—when supposedly protecting them—is not always so readily observed but nevertheless is pronounced. One is the danger posed by the foster care arrangements that the CPS typically places children in when removing them from their homes. Besharov states, "Long term foster care can leave lasting psychological scars...it can do irreparable damage to the bond of affection and commitment between parent and child." Besharov, "'Doing Something,'" at 560. The rate of child maltreatment in foster care is considerably higher than in the general population. Chill, at 460; Mack, 67. Even if children are not taken from their parents, unwarranted intervention has such consequences for children as: "anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control." Joseph Goldstein, Anna Freud, & Albert Solnit, *Beyond the Best*

Interests of the Child 25 (1973). Psychological harm to children, parental anger toward their children, and increased family tensions can result. Id., 25, 72-74. The stresses caused sometimes lead to family break-ups. Chill, at 460. Thus, in many way the CPS assaults the dignity of the very children it claims to serve.

CONCLUSION

For all the foregoing reasons, *amicus curiae* the Society of Catholic Social Scientists (SCSS) urges this Court to affirm the judgment of the 9th Circuit and also to require a compelling state interest standard for abridgement of parental rights and intervention into the family.

Respectfully submitted,

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